

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

JUNE PRYOR AVANCE, et al.

Plaintiffs,

v.

KERR-MCGEE CHEMICAL LLC,

Defendant.

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5:04-CV-209-DF

ORDER

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Caroline M. Craven pursuant to 28 U.S.C. § 636. The Report and Recommendation of the Magistrate Judge dated December 18, 2006, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Defendant filed a “Motion for Reconsideration of the Magistrate Judge’s Order Denying KMC’s Motion for Summary Judgment on all Claims of Diagnosed Plaintiffs.” Dkt. No. 1004. Also before the Court is Plaintiffs’ response, Defendant’s reply, and Plaintiffs’ sur-reply. Dkt. Nos. 1013, 1027 & 1030. The Court held a hearing on February 23, 2007.

Because the Court is reviewing a Report and Recommendation and not a final order, the Court hereby converts Defendant’s motion for reconsideration into objections to the Report and Recommendation.

BACKGROUND

June Pryor Avance and numerous other plaintiffs (“Plaintiffs”) filed this lawsuit against Kerr-McGee Chemical LLC (“Defendant”)¹ seeking damages caused by their alleged exposure from 1960 to 2004 to Defendant’s creosote and pentachlorophenol. Defendant filed its Motion for Summary Judgment on all Claims of Diagnosed Plaintiffs on March 22, 2006. Dkt. No. 292.

On December 18, 2007, the Magistrate Judge issued a Report and Recommendation recommending Defendant’s motion be denied. Dkt. No. 987. Specifically, the Magistrate Judge found Defendant has failed to meet its initial burden in showing that Plaintiffs did not file suit until after the limitations period had expired.

DEFENDANT’S OBJECTIONS

Defendant objects to the Magistrate Judge’s report and recommendation. Defendant asserts the Magistrate Judge erred by “seiz[ing] on Plaintiffs’ Sur-reply contention that the majority of the evidence KMC cited on constructive notice and reasonable diligence related to creosote sites other than the KMC site” Dkt. No. 1104 at 6. Defendant submits that the Magistrate Judge “incorrectly focused on a perceived lack of media coverage regarding the KMC site as a specific potential source of creosote contamination.” *Id.*

DE NOVO REVIEW

After reviewing all papers relevant to Defendant’s motion for summary judgment and Defendant’s objections to the Report and Recommendation of the Magistrate Judge, the Court agrees with the Magistrate Judge that Defendant has failed to meet its initial burden in showing that Plaintiffs did not file suit until after the limitations period had expired.

¹ On September 15, 2005, Kerr-McGee Chemical LLC changed its name to Tronox LLC.


The Court acknowledges Defendant's authority for the proposition that "the discovery rule delays accrual of a cause of action until the plaintiff knew or should have known their *injury*, not the identity of the wrongdoer." Dkt. No. 1004 at 7 (quoting *Baxter v. Gardere Wynne Sewell LLP*, 182 S.W.3d 460, 463 (Tex. App. – Dallas 2006)). Nonetheless, as detailed in the Report and Recommendation, Defendant has not shown that the publicity about creosote, even if sufficiently pervasive, should reasonably have put Plaintiffs on notice of a potential injury. Dkt. No. 987 at 17-19. In particular, Defendant has not shown that the publicity related closely enough to the geographic area in which Plaintiffs resided to warrant judgment as a matter of law on this issue.

CONCLUSION

For all of these reasons, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the Report of the United States Magistrate Judge as the findings and conclusions of this Court.

Defendant's Motion for Summary Judgment on All Claims of Diagnosed Plaintiffs (Dkt. No. 292) is hereby **DENIED**.

SIGNED this 26th day of April, 2007.



DAVID FOLSOM
UNITED STATES DISTRICT JUDGE